was no more good law. The 1957 White Book, on which our Rules of the Supreme Court are based, shows that the proviso to Order 19 rule 22 was added by R.S.C. (No. 1), 1949. The proviso states that if plaintiff intends to allege that defendant was actuated by express malice he shall deliver a reply giving particulars of facts and matters from which such malice is to be inferred. I should point out the proviso speaks of express malice. Thus, *Mallal's* Supreme Court Practice at page 266 cites *Smith's case*[3] to say where, in order to succeed, it is necessary for the plaintiff to prove that the defendant was actuated by an improper motive he need not specifically allege malice in his reply if he has already done so in his statement of claim or if the defendant in his defence has pleaded that he acted in good faith. The point is that if plaintiff has already alleged malice in his statement of claim the proviso does not come into play. Consequently, the last ground must also fail.

For reasons given, I would dismiss the appeal with costs. The deposit is to be paid to respondent on account of taxed costs.

Ong Hock Sim F.J. and **Yusoff J.** concurred.

Appeal dismissed.

Solicitors: *Thomas & Co.; Reddi & Co.*

LEW VOON KONG & ANOR. v. MUSTAFFA BIN KAMIS

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 3, 1977 and January 9, 1978]

[Alor Star — Federal Court Civil Appeal No. 128 of 1976]

Tort — Negligence — Collision at cross-roads — Apportionment of liability.

In this case an accident occurred at a T-junction between a motor-cyclist which had come out of the side road and a motor car which was proceeding on the main road. The accident occurred at the main road and it appeared that the motor-cyclist on emerging from the side road without stopping had shot across to the other side of the road and into the path of the oncoming car. The collision was head-on. The President of the Sessions Court held both parties equally to be blamed and awarded the motor-cyclist who made the claim $2,125 with costs. An appeal to the High Court was dismissed. The appellants appealed to the Federal Court.

Held: (1) in this case on the facts the blame must be laid entirely at the door of the motor-cyclist;

(2) the learned judge of the High Court had made a mistake on the facts in thinking that the motor-cyclist turned north after he came out of the side road. In such an event there could not have been a head-on collision. But for this mistake it would be doubtful if the learned judge would have upheld the decision;

(3) the findings of the learned President Sessions Court when related to the sketch plan and the photographs established beyond doubt that the accident was the result of the foolish and not merely careless or negligent riding of his motor-cycle by the plaintiff.

Cases referred to:-

(1) *Mohamed Repin* v. *Lim Yu Kee* [1969] 1 M.L.J. 64.

(2) *Hussein & Anor.* v. *Maiden* [1970] 1 M.L.J. 114.

FEDERAL COURT.

N.H. Chan for the appellant.

David C. Alfred for the respondent.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is concerned with an accident that occurred at a T-junction, between a motor-cyclist and a motorist. The motor-cyclist had come out the side-road and the accident occurred on the main road.

The case was first heard by the President Sessions Court at Alor Star. He held both parties equally to be blamed and awarded the motor-cyclist who had made the claim, $2,125 with costs that were assessed. An appeal to the High Court was dismissed. The dissatisfied motorist then appealed to this court.

It is reasonably clear that on emerging from the T-junction, the motor-cyclist had turned left towards Alor Janggus and Alor Star, from which direction the motorist was coming. If each had kept to his own side of the road, there would not have been the head-on collision that occurred. Predictably each claimed the other encroached on his side of the road. The motor-cyclist's oral testimony of the accident was that the motorist was overtaking another motor-cyclist travelling in his own direction and because he had encroached on his side of the road, he (the motorist) had run him down. But that was not what the motor-cyclist said in his police report made shortly after the accident. Neither did he make that averment in his statement of claim, though he did allege in his particulars of the motorist's negligence that the motorist was driving on the wrong side of the road.

The motorist said that the motor-cyclist shot out of the side-road without stopping. If the motor-cyclist had kept to his own side of the road and had not encroached on the other (the motorist's) side, the fact that he did not stop at the junction, as alleged by the motorist, would not absolve the motorist from all blame and might well justify the finding of contributory negligence in the proportion as found by the learned President Sessions Court.

On the evidence, the learned President Sessions Court disbelieved the version of the accident as given by the motor-cyclist. He held there was no other motor-cyclist travelling ahead of the motorist. In other words, the motorist was, in his finding, not overtaking anybody and had no reason to travel on the other side of the road. The learned President Sessions Court made a specific finding that the point of impact occurred on the motorist's side of the road, and concluded, as a finding of fact, that "the first defendant's (i.e. the motorist) version of the accident is true and acceptable."

On the law, the learned President Sessions Court found a conflict of judicial decisions. He thought the Singapore case of *Mohamed Repin* v. *Lim Yu Kee*[1] difficult if not impossible to reconcile with *Hussein & Anor.* v. *Maiden.*[2] Both were cases of accidents at cross-roads. In the former, the trial court held the bus-driver who was on the major-road, free from blame. In the latter, the Federal Court of Malaysia upheld the finding of contributory negligence on the part of the motorist who was on the major road and who, in the view of Azmi L.P. "also owed a duty when travelling on a major road to be on the look-out for other users of the road coming out of a minor road and if he failed to do so, he must also be regarded

as being negligent." Confronted with this conflict of, as he thought, two Federal Court decisions, the learned President Sessions Court loyally preferred the Malaysian decision to the Singapore one. But actually the authorities did not pose the difficulties he thought they did. The Singapore decision on negligence was that of the High Court at first instance. The appeal to the Federal Court was only on the quantum of the award. The principle of *stare decisis* requires him to follow the decision of the Superior Court rather than that of the lower court, when the decisions conflict. There was no doubt which decision he should follow. But the question of following decisions did not arise.

In our view, it would be well for trial judges of motor claim cases to avoid referring to cases where the decisions turn on their particular facts and to remember that dicta on negligence must be related to the facts of the cases. Their duty is to find on the facts before them whether one party has failed in his duty of care towards the other or whether both have failed in their mutual duty to one another. It is a decision on the facts of the case.

In the case under appeal, the relative position of the vehicles after the collision indicated clearly and beyond argument the liability of the motor-cyclist for the accident. His motor-cycle after the accident, had come to rest on the left hand side of the road as one faces north towards Kangar. He had, he said, wanted to turn left at the junction. If so, he would be travelling south. The collision was head-on. The motor-car had at all times kept to its side of the road. The collision took place on the motorist's side of the road. The conclusion is therefore inevitable that the motor-cyclist had shot across to the other side of the road before turning south. He had made a sweeping turn that took him over and into the path of the oncoming car. At a T-junction, it was not a case, as it was in both the cases referred to by the learned President Sessions Court, of having to expect someone coming out of a side road to cross to the other side. There was absolutely no reason to expect that the motor-cyclist, even if it was anticipated that he would disregard the stop-look-go indication across the side road, would execute such a sweeping and stupid turn. It was therefore not a case of the motorist not keeping a look-out. In the circumstances of this manoeuvre when the motorist was approaching the junction, there was nothing he could do to avoid the collision. The blame must be laid entirely at the door of the motor-cyclist.

The learned judge who heard the appeal made, with respect, one serious error on the facts. He thought that the motor-cyclist after coming out of the junction had turned north towards Kangar. If so, the motor-cyclist had every reason to be on the left hand side of the road, facing Kangar, where in the finding of the learned President Sessions Court the accident occurred. But since the motorist was travelling in this direction, he would then run down the motor-cyclist. The accident could not have been head-on as in fact it was, from the damage to the vehicles as seen in the photographs. But for this mistake, it would be doubtful that the learned judge would have upheld the decision.

We were of the unanimous opinion that the findings of the learned President Sessions Court when related to the sketch plan and the photographs established beyond any doubt that the accident was the result of the foolish and not merely careless or negligent riding of his motor-cycle by the plaintiff. Accordingly, we allowed the appeal with costs.

Appeal allowed.

Solicitors: *Cheang Lee & Ong; Aljeffri & Co.*

FOONG GUN MOOI v. LIM YEOK SOON

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 7, 1977 and January 9, 1978]

[Penang — Federal Court Civil Appeal No. 95 of 1977]

Tort — Negligence — Collision at cross-roads — Equal apportionment of liability by trial court — Appeal — No evidence to support finding.

This was an appeal by the appellant against the decision of the High Court at Penang which had assessed her liability as half for the collision with a motor-cyclist. It appeared that the motor-cyclist had come out of a side road, turned right across the road and into the path of the appellant's motor-car. The collision took place on the motorist's side of the road. The learned trial judge found that the motor-cyclist did not stop at the central white line. He however found the driver of the motor car party to blame as he said on the evidence the driver was chatting with her husband and probably looking at her baby whilst she was driving the car. There was no evidence to support the inferences made by the learned trial judge.

Held: as there was no evidence to support the findings of the learned judge, the judgment finding the motorist equally to blame for the accident could not stand. The evidence clearly pointed to the entire negligence of the motor-cyclist.

FEDERAL COURT.

R.J. Manecksha for the appellant.

B.S. Sidhu for the respondent.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal was by the defendant motorist who was dissatisfied with the decision of the High Court in Penang assessing her liability at a half for the collision with a motor-cyclist who had claimed damages from her. She said she was at all times travelling on the main road and on her correct side. The motor-cyclist had come from the opposite direction. He had intended to turn into Seang Teik Road which is a side-road forming a T-junction with the main road. He had turned right across the road and into her path. The collision took place on her side of the road. She denied she was to be blamed at all. She said that in the finding of the learned judge that the motor-cyclist did not stop at the central white line, this must be so.

It was the case for the motor-cyclist that he had stopped at this central dividing line to allow the motorist to pass before negotiating the turn. This the learned judge did not believe or accept. With respect, he could not have done otherwise. The uncontrovertible evidence of the sketch plan showing the positions of the vehicles after the accident leads to the inescapable inference that the accident occurred on the motorist's side of the road. The car had after the accident come to a halt with its offside front tyre